had no authority to deal in insurance stamps. The magistrate found that the defendant had shown a "lawful excuse" but a Divisional Court (Lord Goddard C.J. Humphreys and Devlin JJ) took a different view and remitted the matter with a direction to convict. In the opinion of the Board this decision does not advance the case for the Crown in this appeal. Apart from being distinguishable on its facts, the judgment of Lord Goddard (in which the other members of the court concurred) does not touch upon the effect of a new situation arising after a period of unlawful possession. There was no reason why it should. The case was one in which the excuse offered was plainly based upon the circumstances of an acquisition which the court held to be an unlawful transaction. In the result, the excuse was adjudged unlawful because the acquisition was unlawful. But this is very far from saying that an excuse can never be lawful if it follows upon an unlawful acquisition. And it is also very far from saying that the like result should attend the facts of the present appeal: for the appellant here made no attempt to rest his defence on the nature of his acquisition or on the character of his possession previous to the occasion in respect of which he was charged. On the contrary, his whole case was that he had a lawful excuse, despite his previous guilt, because the facts and circumstances of that occasion gave him an excuse which was lawful and which he had not had before.

Their Lordships cannot, therefore, regard this submission as supported by authority. Nor are they aware of any general principle of law which would be capable of sustaining it. Indeed, it appears to them that the submission runs against the implications of the regulations. As a general proposition it appears to confuse "lawful excuse" and "lawful authority". But as already observed, these expressions raise distinct issues and the question here is not necessarily determined by the absence of "lawful authority". It is still whether, without having "lawful authority", the appellant had yet a "lawful excuse".

While the evidence as to the contents of the Government pamphlets was meagre their Lordships are of opinion that the testimony of the appellant, if accepted, went far enough to justify a finding that he was carrying the revolver on the occasion charged in the course of complying with the Government's request and because he wanted and was waiting to surrender with it to the police when they arrived and had actually tendered it to the Temiars to whom he had made his offer of surrender. In the light of the views already expressed in dealing with the points made against the appellant, their Lordships, are unable to resist the conclusion that such a finding would have warranted a verdict of "lawful excuse" and they are, accordingly of opinion that that issue ought to have been left to the assessors.

It by no means follows that had this course been taken the appellant would have been acquitted. But he might have been, and having regard to the conclusions reached and the practice of the Board as stated by Lord Summer in *Ibrahim's case*[4] at page 615, the verdict clearly ought not to stand.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be allowed and the conviction and sentence set aside.

Appeal allowed.

Solicitors: *Hy. S. L. Polak Co.; Charles Russell & Co.*

KARTAR SINGH v. PAPPA

[O. C. J. (Thomson J.) March 23, 1954]

[Ipoh — Civil Suit No. 357 of 1953]

Practice and Procedure — Civil Procedure Code (Cap. 7), s. 29 — Suit to include whole claim — Obligation and collateral security for performance to constitute one cause of action — Action for money had and received still open.

The parties in this case had executed an agreement by which the defendant covenanted to repay a loan with interest and assigned by way of security a dwelling house with plank walls and cement floor. The agreement was in the form of a Bill of Sale. The plaintiff then commenced proceedings by way of Originating Summons asking for foreclosure and sale of the house. At the hearing the Summons was struck out on the ground that the house was not a personal chattel within the meaning of the Bill of Sale Enactment. The plaintiff subsequently instituted proceedings by way of Suit and rested his claim on an implied agreement or alternatively for money had and received. In her defence the defendant pleaded that this claim was barred by s. 29 of the Civil Procedure Code; and the parties agreed to have this preliminary point decided.

Held: (1) the effect of s. 29 of the Civil Procedure Code, once the security has been sued upon, is to bar the plaintiff from suing on the obligation created by the agreement, and that bar cannot depend in any way upon the nature of the evidence by which it is sought to prove the obligation; (2) it is open however to the plaintiff to proceed on an action for money had and received, for an action would lie quite apart from any contract, once certain facts which do not include agreement between the parties are established.

Cases referred to:—

(1) *Mohamed Abdullah v. Teoh Teng Swee* (1953) M.L.J. 141.

(2) *Fibrosa Solka Akeyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1943) A.C. 32.

(3) *Moses v. Macferlan* (1760), 2 Burr. 1005, p. 1012.

(4) *Bradford Advance Co. Ltd. v. Ayers & Wife* (1924) W.N. 152, 153.

CIVIL SUIT.

J. R. Devadas for the plaintiff.

K. C. Chan for the defendant.

Cur. Adv. Vult.

Thomson J. : —On 28th February, 1950, the parties to these proceedings executed a written agreement relating to an alleged loan of $2,000 by the plaintiff to the defendant. That document was called a Bill of Sale and was in the form of a Bill of Sale as prescribed by the Bills of Sale Enactment. It purported to be made in consideration of the alleged loan of $2,000; it contained a covenant to repay that $2,000 with interest at $40 per month; and it assigned by way of security a dwelling house with plank walls and cement floor erected on a piece of State land held under Temporary Occupation Licence as security for repayment of the loan.

On 28th September, 1951, the plaintiff commenced proceedings by way of Originating Summons (O.S. 433 of 1951) asking for foreclosure and sale in respect of the house mentioned in the agreement of 28th February, 1950. On that Summons coming on for hearing before Pretheroe J. on 22nd October, 1952, it was "struck out" on the ground that the house in question was not a personal chattel within the meaning of the Bills of Sale Enactment. I have not seen the learned Judge's judgment, but it seems to me that the consequences which flow from it are as follows:

It does not follow that the document is a Bill of Sale which is void for there is no question of lack of registration or lack of conformity with the statutory form. What does follow is that in law it is not a Bill of Sale at all and that accordingly the proceedings in question could not succeed for one or both of two reasons namely, either that proceedings for enforcing a security other than a personal chattel assigned under a Bill of Sale, or a charge on land, should be brought by way of suit and not by way of Originating Summons, or that the subject matter of the security, being a house attached to and so forming part of the land on which it stood, was something which could not by itself be seized and sold.

On 28th November, 1952, the plaintiff commenced the present proceedings by way of suit. I am not concerned with the terms of his original Plaint but in his amended Plaint filed on 16th November 1953, he sued on what he has called an implied agreement on the part of the defendant, independent of the document dated 28th February, 1950, to repay the alleged loan of $2,000 with interest at the rate of 24 per cent per annum, or, alternatively, for money had and received by the defendant on his behalf.

The defendant has filed a defence with all of which I am not concerned at this stage but *inter alia* he has pleaded that by reason of the earlier proceedings in O.S. 433 of 1951 the present claim is barred by section 29 of the Civil Procedure Code and when the matter came on for hearing before me it was agreed that that question should be decided as a preliminary point.

In my opinion, section 29 is an effective bar to any claim based on the written agreement of 28th February, 1950. That agreement placed an obligation on the defendant to repay the principal of the alleged loan and to pay interest. It also provided for collateral security for the performance of that obligation and for the purposes of section 29 (in distinction from the English law on the point) such an obligation and such a collateral security are deemed to constitute but one cause of action. It is beside the point that the collateral security has proved to be illusory and it is beside the point that the proceedings to enforce it were in fact taken by way of originating summons for, as I have pointed out, they should have been taken by way of suit. The plaintiff elected to sue on his security and section 29 is an effective bar to his now suing on the covenant for repayment of the principal and interest.

Moreover I do not think that it is now open to the plaintiff to sue on what he calls 'an implied agreement'. That is a very inaccurate expression. It is true that a certain given concatenation of circumstances may lead to the inference that there has in fact been an agreement and in such a case it may be said that such an agreement is implied from the circumstances. In other words when an agreement is implied from a given set of circumstances there is nothing more or less than a finding that there has in fact been an agreement, that is to say, a *consensus ad idem* of two contracting minds. An agreement so proved does not in its essential nature differ in any way from any other agreement and to say that it does is tantamount to saying that the nature of an agreement may vary accordingly to the nature of the evidence by which it is proved. That as a proposition of jurisprudence is absurd.

Let me put the same point in a slightly different way. It is a common source of error to confuse a fact with the evidence by means of which it is proved. For example, if an agreement has been made and reduced to writing the agreement and the writing to which it is

reduced are different things. The agreement is the legally significant fact, the writing is only the evidence by means of which it is proved. The application of that observation to the present case is as follows :

The plaintiff says that sometime in February, 1950, in consideration of his lending the money to the defendant she agreed to the obligation to repay the money and she gave him collateral security. That agreement and that giving of security were set out in writing in the so-called Bill of Sale of 28th February, 1950. From these facts it follows that the plaintiff cannot now set up what he calls 'an implied agreement' for two reasons. In the first place, he can only do so by giving evidence as to the circumstances from which the agreement is to be implied and the agreement having been reduced to writing such evidence is inadmissible by reason of section 91 of the Evidence Ordinance. In the second place, and this is an even more fundamental objection, even if such evidence could be admitted it would be evidence not of a different agreement from the one which was reduced to writing but of the same agreement. In other words, there was only one agreement and it is wholly immaterial that if it were not for section 91 of the Evidence Ordinance two different bodies of evidence, that is to say, the writing on the one hand and the surrounding circumstances on the other, would be available to prove it. It was for the purpose of the obligation contained in this agreement that the security was given and the effect of section 29 of the Civil Procedure Code once the security has been sued upon is to bar the plaintiff from suing on the obligation and that bar cannot depend in any way upon the nature of the evidence by which it is sought to prove the obligation. So much for any attempt on the part of the plaintiff to set up what he calls 'an implied agreement'.

I see, however, no reason why the plaintiff should not sue for money had and received. I discussed the nature of this cause of action in the case of *Mohamed Abdullah v. Teoh Teng Swee*[1] and see no reason to repeat what I said there beyond quoting the following passage from the speech of Lord Wright in the case of *Fibrosa Solka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd.*[2] where after referring to the judgment of Lord Mansfield in the case of *Moses v. Macferlan*[3] His Lordship said :—

"Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort . . . ." The gist of the action is a debt or obligation implied, or, more accurately, imposed, by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost."

The truth is that an action for money had and received has nothing in common with an action in contract. In the case of contract the obligation arises from the agreement of the parties and in the present case it was for the performance of this obligation that the security was given. In the case of an action for money had and received, the obligation is created by operation of law once certain facts which do not include agreement between the parties are established.

It follows, then, that the present proceedings can proceed in so far (but in so far only) as they are based on money had and received.

I am fortified in the result at which I have thus arrived by a consideration of the case of *Bradford Advance Co. Ltd. v. Ayers & Wife*[4]. That was a case where money had been lent on a Bill of Sale which was found to be void and Bailhache J. said :—

"At first sight it would seem that the bill of sale being void, and the covenant to pay interest being therefore void, that the liability to repay the principal had also gone. But that is not so. An action would lie for money had and received, and that action would lie apart from contract or negotiation on the facts of the case, namely, that the plaintiffs had lent the defendant £100, and in those circumstances an obligation to repay the loan arises, and that obligation carries with it an obligation to pay interest at a reasonable rate . . . ."

Paragraph 10 of the Plaint will be struck out and as regards costs, the cost of the proceedings on 24th November, 1953, and to-day will be treated as costs in the cause.

Order accordingly.

ABDULLAH v. REGINA

[C. C.A. (Murray-Aynsley C.J., Pretheroe Ag. C.J. (F.M.) & Whitton J.) September 3, 1954]

[Singapore — Criminal Appeal No. 9 of 1954]

Penal Code, s. 376 — Rape — Girl under age of 14 — Whether a bona fide mistake of fact under s. 79 of the Penal Code is a defence.

The appellant was charged with rape under s. 376 of the Penal Code. There was ample evidence that he had carnal knowledge of the complainant and that her age was under 14. The appellant contended however that he thought she was over 16. At the trial the learned Judge ruled that this belief, if it existed, was immaterial and refused to leave the matter to the consideration of the jury. He was convicted and he appealed to the Court of Criminal Appeal on the point of law that he had reasonable grounds for believing, and did in fact believe that the girl was more than 14 years of age and that he was therefore entitled to be acquitted under s. 79 of the Penal Code.

Section 79 reads: "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a